

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

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Certiorari to York County

Honorable John C. Hayes, Circuit Court Judge  
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RECEIVED

APR 17 2017

Opinion No. 2017-UP-029 (S.C. Ct. App. Filed January 13, 2017) SUPREME COURT

15-GS-46-0272  
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THE STATE,

RESPONDENT,

V.

ROBERT DALE HUGHES,

PETITIONER

APPELLATE CASE NO. 2017-000740  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
\_\_\_\_\_

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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The Court of Appeals erred in affirming petitioner’s conviction by ruling on the sufficiency of the sex registry violation indictment when the issue in the case was whether the indictment was void as a matter of law on a non-offense charged in the case because petitioner had no prior predicate conviction that required him to register as a sex offender.....4

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**CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was filed on January 26, 2017, but denied by the Court of Appeals on February 23, 2017.

### **QUESTION PRESENTED**

The Court of Appeals erred in affirming petitioner's conviction by ruling on the sufficiency of the sex registry violation indictment when the issue in the case was whether the indictment was void as a matter of law on a non-offense charged in the case because petitioner had no prior predicate conviction that required him to register as a sex offender.

## STATEMENT OF THE CASE

Petitioner Robert Dale Hughes was adjudicated guilty of violating the sex registry law per a bench trial held during the May 2015 term of the York County General Sessions Court before Judge John C. Hayes, III. Petitioner was sentenced to imprisonment for a period of five years, suspended upon the service of three years. Phil Smith represented petitioner at trial, and Assistant Solicitor Erin Joyner appeared on behalf of the state.

Petitioner appealed his conviction and sentence, but his case was affirmed by the South Carolina Court of Appeals on January 11, 2017. See State v. Hughes, Unpublished Opinion No. 2017-UP-029 (S.C. Ct App. January 11, 2-17). App. 1-2. A petition for rehearing was filed on January 26, 2017. App. 3-8. The petition for rehearing was denied by the South Carolina Court of Appeals on February 23, 2017. App. 9. This petition for review of the South Carolina Court of Appeals' decision in petitioner's case follows.

## ARGUMENT

The Court of Appeals erred in affirming petitioner's conviction by ruling on the sufficiency of the sex registry violation indictment when the issue in the case was whether the indictment was void as a matter of law on a non-offense charged in the case because petitioner had no prior predicate conviction that required him to register as a sex offender.

Petitioner appealed his May 12, 2015, conviction of failing to register as a sex offender. On March 3, 1994, petitioner pled guilty to third degree CSC with a minor, which was not a crime that existed in South Carolina at that time. Also, note that the sex registry code enacted into law on July 1, 1994, (See S.C. Code. Ann. Section 23-3-430), did not list persons convicted of third degree CSC with a minor as being required to register because no such offense existed in South Carolina at that time. The offense of third degree CSC with a minor did not become a crime in South Carolina until June 18, 2012. Therefore, the state used the 1994 non-conviction as the predicate conviction to subject petitioner to the sex registry law and indict him for failing to register as a sex offender. In other words, the sex registry applied not to petitioner because no predicate conviction existed in his case. As a result, counsel moved to quash the violation of the sex registry indictment levied against petitioner. R. 5, l. 18 – R. 7, l. 8. The state argued simply that petitioner's prior CSC third with a minor should be treated as a regular and generic third degree criminal conduct sexual conviction. R. 7, l. 6 – p. 9, l. 3. The trial judge agreed with the state's position, denied the motion to quash, and found petitioner guilty as charged. R. 20, l. 22 – R. 22, l. 3. This was error.

The issue of SCDC's classification of petitioner's prior as a generic third degree CSC to calculate his release date or parole date as the state argued is procedural in nature and quite different from petitioner's present substantive argument regarding the classification of his non-conviction as a predicate conviction for the purpose of indicting him for a crime that carries penal punishment.

There can be no creation of constructive offenses because offenses are created by Congress, or in this instance by our state legislature. United States v. Alpers, 338 U.S. 680 (1949). Moreover, although CSC third degree became a legitimate criminal offense by statute (S.C. Code Ann. 16-3-655 (C)) **and also** listed as a trigger offense under the new sex registry law on June 18, 2012; nonetheless, new laws are to be construed prospectively rather than retroactivity. See Edwards v. State Law Enforcement Division, 395 S.C. 571, 720 S.E.2d 462 (2011).

Not all prior convictions become automatic predicate convictions in every case. By analogy, compare United States v. Alston, 611 F.3d 219 (4<sup>th</sup> Cir. 2010), where the Court held that the defendant's prior 2<sup>nd</sup> degree assault conviction was improperly used as a predicate conviction to support enhanced sentencing under the ACCA<sup>1</sup> because the facts of this defendant's particular prior for 2<sup>nd</sup> degree assault did not involve violence. Compare also, United States v. Savage, 542 F.3d 959 (2d Cir 2008), where the Court held that because the defendant entered an Alford plea, the plea colloquy contained no factual admissions on which the government could rely to establish the predicate nature of the prior conviction. Also, see United States v. Randall, 171 F.3d 195 (4<sup>th</sup> Cir. 2009), where the Court reversed the defendant's firearm conviction because the jury instructions constructively amended the indictment to include an alternate predicate offense that was not the predicate offense charged originally in the indictment since it was the indicted predicate offense that was essential for a conviction on that firearm charge.

The Court of Appeals affirmed petitioner's conviction and addressed the issue as follows:

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007) ("The trial [judge]'s factual conclusions as to the sufficiency of an indictment will not be

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<sup>1</sup> The Armed Career Criminal Act under 18 U.S.C. §922 and § 924 allows for enhanced federal sentencing if the defendant has three prior convictions for a violent felony or a serious drug offense.

disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.”); Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (“The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the [trial judge] to know what judgement to pronounce if the defendant is convicted.”); State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) (“The trust test of the sufficiency of an indictment is...whether it contains that necessary elements of the offense intended to be charged [] and sufficiently apprise[s] the defendant of what he must be prepared to meet.”).

However, this Court might have misinterpreted petitioner’s claim as attacking the notice or sufficiency requirements of his indictment when to the contrary, the argument was that the indictment should have been quashed as a **matter of law** because it contained no crime charged within. In other words, petitioner’s prior predicate conviction from 1994 was unusable as it was a non-conviction in that degree CSC with a minor was not a criminal offense during that plea proceeding. The absence a prior conviction that would be the equivalent of a predicate conviction requiring petitioner to register per the sex registry law meant that the sex registry violation indictment submitted in this case should have been quashed as a **matter of law**.

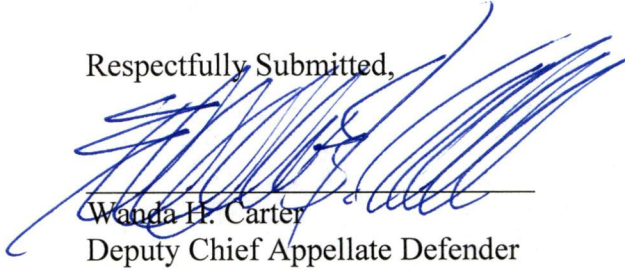
Here, petitioner’s prior predicate conviction was unusable as well since it was a non-conviction because third degree CSC with a minor was not a criminal offense during his 1994 plea proceeding. The absence a prior conviction that would be the equivalent of a predicate conviction requiring petitioner to register per the sex registry law meant that the sex registry violation indictment submitted in this case should have been quashed.

WHEREFORE, based on the foregoing points, petitioner would request that this Court allow full briefing on the issue of whether the indictment in question should have been quashed as a **matter of law** for charging a crime that did not exist and could not be cured via findings that the proper “notice” and “sufficiency” requirements were satisfied.

**CONCLUSION**

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allowing full briefing on the above raised issue.

Respectfully Submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of April, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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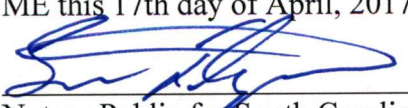
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robert Dale Hughes, #210373, at 609 Trailmaster, , Rock Hill, SC 29730, this 17th day of April, 2017.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 17th day of April, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.